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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-5382

WILLIE JASPER DARDEN,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

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AUTHORITIES CITED

OTHER AUTHORITIES

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WILLIE JASPER DARDEN,

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Respondent.

Respondent contends that the Petition for Writ of Certiorari here sought should not issue to review the judgment of the Supreme Court of Florida.

CITATIONS TO OPINIONS BELOW

Petitioner's citation to the opinion sought to be reviewed [Darden v. State, 329 So.2d 287 (Fla. 1976)] is accurate.

JURISDICTION

Respondent concedes the jurisdiction of this Court under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND QUESTIONS PRESENTED

Respondent will present its interpretation of both constitutional provisions and questions presented in the body of its arguments why the writ should not issue.

STATEMENT OF THE CASE

Respondent will recite appropriate facts and circumstances relative to the questions presented in the body of its argument. References to the record on appeal which was before the Florida Supreme Court will be indicated by the symbol "R" followed by the appropriate page number.

REASONS FOR NOT GRANTING THE WRIT

1. As his first ground, Petitioner complains of the closing arguments presented by the prosecutor. In order to best view these arguments it is necessary to be aware of the evidence upon which they were predicated.

On the evening of September 8, 1973, Mrs. Helen Turman was present in her furniture store located in Lakeland Florida (R-199). Some time between 5:00 P.M. and 6:00 P.M. the Petitioner entered the store expressing his desire to look at some furniture. With the exception of Mrs. Turman, he was the only one present in the building (R-203). Mrs. Turman proceeded to show him some couches and bedding. Petitioner apparently left momentarily telling Mrs. Turman that his wife would be back, presumably to inspect the same items he had been shown. Petitioner then returned and asked to see some ranges and stoves. Mrs. Turman complied with his request and in response to an inquiry of price Mrs. Turman started towards her adding machine (R-205). At that point, Petitioner grabbed Mrs. Turman's right arm and stuck a gun in her back and ordered her to do as he said. Petitioner then told the lady to fasten a glass sliding door and not to try anything funny. After this was accomplished he took Mrs. Turman to the cash register and told her to open it up (R-206). He then emptied the cash register drawer of all bills, the amount of which was not more than $15.00 (R-207). Petitioner then took Mrs. Turman to the back room of the store where some box springs and mattresses were stacked against the wall. At that moment Mrs. Turman's husband appeared at the back door, was warned by his wife not to come in and was immediately shot between the eyes. It was from this wound that Mr. Turman died (R-415).

-4- Petitioner then told Mrs. Turman not to move and

went over to her husband's body and pulled it half-way into the building (R-209). He returned to Mrs. Turman and told her to get down on the floor (R-209). As he unzipped his pants and undid his belt buckle, Petitioner told Mrs. Turman to take out her teeth and suck his penis (R-210). After this act was completed, Mrs. Turman and Petitioner were walking half-way back through the building when a neighbor and part-time employee, Phillip Arnold, shoved the back door open (R-211). Mrs. Turman screamed to Phillip Arnold to go back.

Phillip Arnold was squatting over Mr. Turman's body but did not know what Mrs. Turman meant by her warning (R-433). Phillip Arnold asked Petitioner to held move Mr. Turman out of the water. Petitioner replied "Sure, buddy, I'll help you." (R-435). Phillip Arnold looked down at the body and when he looked up Petitioner was standing over him with a gun in his face (R-435). Petitioner then pulled the trigger but the gun just "clicked" (R-436). Petitioner then pulled the trigger again and shot Phillip Arnold in the mouth. Phillip Arnold then started to run away from the store and Petitioner shot him in the neck (R-435). While still running away from the store, Phillip Arnold was shot yet a third time in the side (R-437).

Other evidence indicating Petitioner's guilt revealed that in an attempt to flee the scene, Petitioner wrecked his car, a vehicle matching the description of the one leaving the store. The probable murder weapon was found 39 feet from the scene of that wreck.[1]

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[1]Expert testimony revealed that the weapon recovered at the scene of the car wreck was a .38 caliber revolver which had been modified to use .38 special cartridges. Because of this modification it was impossible to scientifically prove that the bullets recovered were fired from that gun. However, evidence showed that the cartridges, both live and spent, found in the gun were arranged and situated so that if someone had taken the gun and reconstructed the shots at the killing, the hammer to bullet relationship would be (and was) identical.

It was essentially the above evidence which was presented in the prosecution of Petitioner. It were these facts and circumstances which made the basis of the closing arguments; it was this evidence that the Florida Supreme Court considered as being "uniquely viscous crimes". Darden v. State, 329 So.2d 287 (Fla. 1976) at 290.

Respondent analyzes Petitioner's position with regards to this point as follows:

Although not specifically making references thereto, Petitioner is obviously aware of the rule of law that a federal appellate courts' review of state court proceedings is the narrow one of due process, rather than an exercise of the supervisory power over federal trial courts. Petitioner must be aware that this Court has recognized that a prosecutor in the heat of argument may understandably make improper or exaggerated statements, but that such statements will not necessarily constitute a violation of due process, Sawyer v. United States, 202 U.S. 150 (1906). It has been stated that each case must be decided on its own facts and circumstances. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Petitioner also obviously knows that one of the factors to be considered in accessing the propriety of prosecutorial remarks is the relative strength of the prosecution's case. Berger v. United States, 295 U.S. 78 (1935).

Accordingly, it must be determined whether the remarks complained of, when viewed in light of all facts and circumstances, Donnelly v. DeChristoforo, 416 U.S. 637 (1974), deprived Petitioner of a fair trial and due process of law. It was this issue that the Supreme Court of Florida considered. An examination of that tribunal's decision reveals the acknowledgement that although the remarks constituted a violation of the Code of Professional Responsibility they did not deprive Petitioner of a fair trial, in

light of the totality of the evidence presented. The Florida Supreme Court noted that the remarks were in part responsive to defense counsel's remarks, that there was but a single objection to the closing arguments, and it was not directed to any of the allegedly inflamatory matters.

Considering these factors, as well as the overwhelming evidence of guilt, the Florida Supreme Court concluded that the closing arguments amounted to harmless error and that a deprivation of due process did not occur.

Respondent is, of course, aware that the overwhelming evidence of guilt militates against Petitioner's argument. Respondent is also aware that Petitioner claims constitutional infirmities in the manner in which he was identified. His effort is obvious; if he can show that his pre-trial and in-court identifications were unconstitutionally made then he necessarily can show that the evidence against him was weak thereby causing resolution of this particular question to weigh more in his favor. However, for the reasons discussed later in this response, Respondent submits that evidence of guilt was quite strong and that because of that factor the remarks of the prosecutors, if error, were harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969); see also Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972).

2. As his second reason for granting the Writ, Petitioner voices his extreme dissatisfaction in the manner by which he was identified before and during trial.

Initially, he refers us to Mrs. Turman's identification of him at the preliminary hearing. In an effort to create apparent confusion as to what standards are to apply, Petitioner does nothing more than track the reasoning of the Second Circuit Court of Appeals in Brathwaite v. Manson, 527 F.2d 363 (2 Cir. 1975), in an effort to show this Court that certiorari should be granted, if for no other reason than to clarify what Respondent deems the erroneous reasoning found in that decision. Respondent cares not how the Second Circuit Court of Appeals considers and interprets this Court's decisions. It is Respondent's position that the principles set forth in Neil v. Biggers, 409 U.S. 188 (1972) control.

As Petitioner correctly states, approximately four days after the murder he was given a preliminary hearing. At that hearing Mrs. Turman was called to the stand and she identified Petitioner as the man who killed her husband. Interestingly, Petitioner characterizes this preliminary hearing as a "tactic" of the State, one which was inherently suggestive. That is indeed noteworthy since this so-called "tactic" was a procedure utilized for the sole purpose of determining the existence of probable cause to bind the Petitioner over for trial. This "tactic" is a right which this Court has considered absolutely necessary before a defendant in Florida may be restrained. See Gerstein v. Pugh, 420 U.S. 103 (1974).

The purpose for having the preliminary hearing was to simply see if there was sufficient evidence to bind the Petitioner over for trial. Needless to say, if such evidence was lacking the man would have gone free. It was this proceeding which Petitioner would equate with a so-called

impermissibly suggestive show-up. This simply is absurd. The basis for Respondent's assertion of absurdity lies in the very obvious difference between the scope and function of a preliminary hearing and a one-to-one show-up. Had Mrs. Turman confronted Petitioner at a police station or jail or whatever and was asked the question "Is this the man who shot your husband?" then prehaps, arguably, Petitioner's position would be somewhat stronger. In that situation the confrontation would not be subject to fair and meaningful review at trial. In contrast to such a completely one-sided procedure the preliminary hearing identification was conducted in open court before a judge and with the presence of counsel. As such, an objective review may easily be had. That review shows that Mrs. Turman was asked "Is this the man that shot your husband?" she replied "Yes, sir" (R-50). After further testimony and cross-examination, the State moved "that the defendant be bound over to the Circuit Court on the charge of murder." Thereupon, the following transpired:

> "THE COURT: Mrs. Turman, I have only one question, because it's very important and I'll have to go back over it one more time, to be sure.
>
> "A. Yes, sir.
>
> "THE COURT: Are you sure about the identification of this man you see in front of you as being the same man that you've spoken about?
>
> "A. Even with his back to me while I sat back there, I reached over and touched my sister's hand and said, 'That's him.'
>
> "THE COURT: Alright." (R-53)

If we now apply the factors ennunciated in Neil, supra, we see that Mrs. Turman viewed the Petitioner under close, if not intimate, conditions for a period of time sufficient for him to have accomplished all of the events previously stated. Mrs. Turman's degree of attention, while perhaps not satisfactory to Petitioner, was nonetheless sufficient to cause her to be absolutely positive and certain

as to Petitioner's identity. One must temper the degree of certainty with the emotion of the moment. Although the lady did not pay that much attention to physical characteristics or clothing, she did remember customer's faces.

> "I did make that statement that I don't pay that much attention to how they are dressed or anything, but faces I do remember. I remember my customers." (R-232)

There can be no doubt but that Mrs. Turman was absolutely certain at the time she identified Petitioner at the preliminary hearing. As previously quoted, she could tell who he was while his back was to her and before she even took the stand at the preliminary hearing. The length of time between the crime and the confrontation was but a few days.

With regards to the pre-trial identification by Phillip Arnold, the record reveals that while in the hospital recovering from his wounds Phillip Arnold was shown six photographs and was told to study them and be certain of his identification before he decided (R-475). Two of these photographs, Petitioner's included, had names on them. Mr. Arnold selected the Petitioner's photograph. Although at trial certain discrepancies were noted in Mr. Arnold's testimony as to time and other conditions the trial court allowed his in-court identification based on the following colloquy:

> "Q: All right, Mr. Arnold, I want you to look at this man and tell me whether or not you can identify him from the time you saw him when he blasted you in the face? Can you, think back to September 8th, 1973, forget everything else, forget the hospital, forget everything, September 8th and right now.
>
> "A: Yes, sir, that's him.
>
> "Q: Do you have any doubt whatsoever in your mind?
>
> "A: No, sir, none.

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"Q: Did the photographs--Are you remembering the photographs?

"A: No, sir.

"Q: What are you remembering?

"A: The day I was shot.

"Q: Are the photographs helping you in any way?

"A: No, sir.

"Q: Whatsoever to identify him?

"A: No, sir.

"Q: None whatsoever in your mind?

"A: None.

"Q: Has any newspaper articles--

"A: No, sir.

"Q: --helping you identify this defendant?

"A: No, sir.

"Q: Why are you identifying him?

"A: Because that's the man that shot me." (R-466-467)

* * *

and before the jury:

* * *

"Q: Phillip, I want you to think back to the afternoon or the evening of September the 8th, 1973. I want you to remember the person that had the gun in your face. I want you to remember the person who pulled the trigger, and remember the person that shot you in the face.

"A: (Nods head.)

"Q: And in the back or side.

"A: (Nods head.)

"Q: I want you to look in the courtroom and see if you see that man today.

"A: Yes, sir, the Defendant.

"Q: What color shirt does he have on today?

"A: Blue.

-//-

"Q: That's the man at the end of the table?

"A: Yes, sir.

"Q: Phillip, is there any doubt whatsoever in your mind that the man you pointed to is the Defendant?

"A: No, sir, none.

"Q: None at all.

"MR. MCDANIEL: Let the record show that the witness identified the Defendant."
(R-492)

Accordingly, the issue descended to one of credibility and as such was proper for the jury to consider.

In rejecting Petitioner's claim on appeal the Florida Supreme Court, although not specifically so stating, probably relied on established Florida law, e.g. Tafero v. State, 223 So.2d 564 (Fla.App.3d 1969), and its own decision in Chaney v. State, 267 So.2d 65 (Fla. 1972). In both cases the impact of this Court's decisions was discussed, especially Simmons v. United States, 390 U.S. 377 (1968), and Kirby v. Illinois, 406 U.S. 682 (1972). A quick reading of Chaney, supra, conclusively shows that the Florida Supreme Court is aware of this Court's guidelines and further that these guidelines were considered and applied to Petitioner's claim. Respondent submits that based on the totality of the circumstances both with regards to Mrs. Turman and Phillip Arnold, the identification of Petitioner did not violate constitutional safeguards.

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3. As his final point, Petitioner disdains the fact that five prospective jurors were excused for cause on the basis of their opposition to capital punishment. He specifies two veniremen who he claims were less than conclusive in voicing their objections to the death penalty.

The record shows that the five prospective jurors who were excused were done so on the basis of the following exchanges:

> "All right, Mrs. Macy, do you hold such conscientious moral or religious principles in opposition to the death penalty you would be unwilling under any circumstances to recommend the death sentence?
>
> "MRS. MACY: No, sir.
>
> "THE COURT: Do you, Mr. Blankenship?
>
> "MR. BLANKENSHIP: No, sir.
>
> "THE COURT: Mr. Pelellat?
>
> "MR. PELELLAT: No, sir.
>
> "THE COURT: Mrs. Spike.
>
> "MRS. SPIKE: No, sir.
>
> "MR. VARNEY: Yes sir.
>
> "THE COURT: You feel then, sir, that even though and I am not saying it will it would be purely speculative, in the event that the evidence should be such that under the law that should be the legal recommendation you would be unwilling to return such a recommendation because of your conscientious beliefs?
>
> "MR. VARNEY: I believe I would." (Emphasis added) (R-44)

* * *

> "THE COURT: Mrs. Hann, do you hold such strong conscientious moral or religious beliefs that you would be unwilling under any event to return a death sentence?
>
> "MRS. HANN: No, sir.
>
> "THE COURT: Mr. Waller?
>
> "MR. WALLER: No, sir.
>
> "THE COURT: Mr. DeMilt?

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> "MR. DeMILT: No, sir.
>
> "THE COURT: Mr. Dorminy?
>
> "MR. DORMINY: No, sir.
>
> "THE COURT: Mrs. Keck?
>
> "MRS. KECK: No, sir.
>
> "THE COURT: Mr. Roberts?
>
> "MR. ROBERTS: No, sir.
>
> "THE COURT: Mr. Mays?
>
> "MR. MAYS: Yes, I could not recommend it.
>
> "THE COURT: All right.
>
> "You will be excused, Mr. Mays. Mr. Maloney, I assume you wish the same objection to apply to him.
>
> "MR. MALONEY: Yes, Your Honor.
>
> "THE COURT: So recorded." (Emphasis added) (R-45-46)

* * *

> "THE COURT: All right, sir, have a seat.
>
> "Ms. Carn, the fact your husband for a while was a police officer and the fact that we have here listed as witnesses many police officers and deputy sheriffs conceivably could raise a little bit of a problem. Do you think that because of your husband's previous occupation that you might be a little inclined to give what the officers say more weight than you would any other witness you didn't know?
>
> "MS. CARN: I don't think that would; but I do not believe in capital punishment.
>
> "THE COURT: The question isn't, ma'am, whether you believe in capital punishment or not; the question is whether or not you have such a strong disbelief in it as to make it unable for you to vote to return a recommendation of the death penalty regardless of what the evidence might be.
>
> "MS. CARN: That's right.
>
> "THE COURT: All right, ma'am. Then we will excuse you then rightnow [sic]. I appreciate your candor." (Emphasis added) (R-106-107)

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BY THE COURT: "I have asked the others and I will ask each of the four of you whether you have such strong religious, conscientious or moral principles against the imposition of the death penalty that you would be unwilling to vote to return a recommended sentence of the death penalty regardless of what the evidence or the facts might be?

"Would you Ms. Pigeon?

"MS. PIGEON: Yes, sir.

"THE COURT: Mr. Wall?

"MR. WALL: No, sir.

"THE COURT: How about you, Ms. Maher?

"MS. MAHER: Yes, I do have such convictions. I am a Seventh Day Adventist.

"THE COURT: And no matter what the evidence showed you don't think you would vote for it?

"MS. Maher: I couldn't, sir.

"THE COURT: Very well, over the objections of the defendant she will be excused. (Emphasis added) (R-109-110)

* * *

"THE COURT: Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?

"MR. MURPHY: Yes, I have.

"THE COURT: All right, sir, you will be excused then." (Emphasis added) (R-165)

Clearly from an examination of the above, it is seen that each of the prospective jurors could not, and would not, take any part of the proceedings if the possibility of death was the penalty regardless of what the evidence showed. While it is true that Mr. Murphy "was excluded on the basis of an even more perfunctory exchange", Petitioner forgets that Mr. Murphy, as well as all veniremen, were present in the courtroom during the examination of all prospective jurors. Mr. Murphy heard questions asked of other veniremen, he knew the purpose of the questions relating to capital

punishment and he had ample time to make up his mind how he felt. Although the record shows that Mr. Murphy was excluded by virtue of one question, it must be remembered that his answer was given in response to not only that question but all others similar to it.

Simply put, the five prospective jurors were excused due to their opposition to capital punishment. This is conceded. The reason for their exclusion is relatively easy to understand.

First, Respondent contends that Witherspoon v. Illinois, 391 U.S. 510 (1968), is of no significant applicability to the situation at bar. The reason for this is clear; under Florida law, §921.141(3), F.S., the jury is not responsible for the penalty imposed in a capital case. The burden of assessing what penalty a given defendant should suffer is visited solely upon the trial judge. In the clear language of the statute, the function performed by the jury during the sentencing phase of a capital trial is advisory only. Proffitt v. Florida, ___U.S.___, 49 L.Ed. 2d 913, 96 S.Ct. ___ (1976).

Accordingly, it is wondered what difference it makes that the jury which convicted the Petitioner contained no members opposed to capital punishment. If they play no part in the ultimate decision of life or death, how can it be said that the State of Florida "entrust[ed] the determination of whether a man should live or die to a tribunal organized to return a verdict of death." Witherspoon at 521.

The law of this State is that if a man commits a capital crime he may, subject to being convicted, face two possible penalties--death or life imprisonment. What we hope to accomplish in excluding prospective jurors opposed to capital punishment is a jury that is at least "willing

to consider all of the penalties provided by state law . . ." Witherspoon at 522, note 21. We obviously, through such exclusion, do not necessarily impanel a strictly "pro-death" jury. We simply have one which is not irrevocably committed to vote against the death penalty even if the facts support such a measure. The people of the State, in enacting our law, are just as much entitled to such a composition of a capital jury as is a defendant facing a Witherspoon situation where the jury actually determines the penalty.

If Florida did not have the law it does concerning the imposition of the death penalty, then perhaps Petitioner could have at least an arguable contention. Assuming, however, arguendo that a Witherspoon jury system existed in this State, then the exclusions of the five prospective jurors sub judice still would not have violated the teachings of Witherspoon. As Petitioner correctly states in his brief, exclusion is legally permissible when veniremen make it unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. He complains however that no inquiry was made concerning the personal beliefs of the prospective jurors vis-a-vis the determination of guilt. Respondent notes that the above requirements are stated in the disjunctive; only one need be present.

Consequently, even if Witherspoon controls, its requirements were met. Its requirements, however, need not be considered since the jury sub judice played but an advisory role in the ultimate decision to impose death as the penalty for Petitioner's crimes.

Turning now to Petitioner's claim that by excluding a "class" of prospective jurors (those opposed to capital punishment) he was not tried by a representative cross section of the community.

Perhaps it is at best arguable that those opposed to capital punishment could be considered a "class" of society; it probably could likewise be considered that people with blue eyes are also a "class". In short, there are probably as many distinct classes of society as there are members of society.

Respondent submits that if those people who were excluded constituted a class of any kind then it was one which should be more properly termed "not willing to follow the law as instructed." §921.141(2), F.S., specifically requires that:

> "After hearing all the evidence the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);
>
> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death." (Emphasis added)

Instructions to that effect were given prior to voir dire. Query: if the law requires that the jury deliberate on the issue of penalty, included in which is death, and we know that those opposed to capital punishment will not consider one of the options required by law, then these people will not follow the law. These people are no different than those who state that they will not follow any of the instructions given them by the court. They are automatically defective as far as any notion of the purpose of the trier of fact.

If these people constitute a class it is as that described above. But it is not of such nature as those discussed in the cases cited by Petitioner. Examination of those cases reveal that the classes, whether grouped by race, age, or sex, were automatically excluded from even being in a venire. They didn't get the chance to even be put on a list of any sort. Obviously therefore whatever the makeup of the juries in those cases, it necessarily lacked representatives of the class excluded well prior to any voir dire.

Such is not the case sub judice nor is it the case in any other capital trial. The group of people posed to capital punishment are not excluded within the meaning of the cases Petitioner offers as authority; they are excused during examination since they refuse (or will refuse) to follow the law as instructed.

CONCLUSION

It is respectfully submitted, based on the above and foregoing, that none of Petitioner's reasons for granting the Writ are based upon situations which rise to a federal constitutional level. If any of the proceedings about which he complains were error, they were harmless beyond a reasonable doubt. Accordingly, having not shown sufficient cause to invoke this Court's discretionary review, Petitioner's Petition for Writ of Certiorari to the Florida Supreme Court should be denied.

Respectfully submitted,

Robert L. Shevin
Attorney General

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Assistant Attorney General

COUNSEL FOR RESPONDENT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Certiorari to the Supreme Court of Florida has been forwarded to Geoffrey M. Kalmus, Esquire, Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, 919 Third Avenue, New York, New York 10022 and Harold H. Moore, Esquire, 2058 Main Street, Sarasota, Florida 33577, Attorneys for Petitioner, this _____ day of October, 1976.

Of Counsel

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